SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 3 1971
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 835

ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

VANDER VEEN, FREIHOFER & COOK
Attorneys for Petitioner,
Robert Kenneth Dewey

By Donald F. Oosterhouse

By Peter R. Tolley

Business Address:
950 Union Bank Building
Grand Rapids, Michigan 49502
616-454-9321

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE, N.W., GRAND RAPIDS, MICHIGAN 49502 — PHONE GL 8-5326

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of Facts	2
Argument	5
I. Does an employer engage in religious discrimination in violation of Section 703(a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?	5
A. Reynolds Metals Company violated Section 703(a)(1) of Title VII (42 USC 2000e-2(1)) by conditioning Dewey's continued employment upon his willingness to forfeit or otherwise compromise his religious beliefs	5
B. Reynolds Metals Company did not reasonably accommodate Dewey's religious beliefs considering that Reynolds knew that Dewey's religious beliefs forbade Sunday work or the solicitation of a replacement, and further, considering the availability of other qualified employees	13
C. Reynolds' otherwise discriminatory conduct of discharging Dewey for refusing to work on his Sabbath, is not rendered lawful because of the "bona fide seniority system" exception set forth in 703(h) of Title VII (42 USC Section 2000e-2(h)	20
D. Assuming Reynolds violated Title VII by discharging Dewey because of his religious beliefs, Reynolds' claim of "good faith" cannot deprive the courts of their power to shape and provide a remedy for this violation	22

TABLE OF CONTENTS (CONT'D)

Page

II. Is an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement is barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge? .. 25

A. The doctrine of election of remedies is not applicable to a situation in which the Plaintiff enjoys two separate rights or causes of action 25

B. Rights created under a collective bargaining agreement and rights created under Title VII are separate and distinct rights .. 26

Conclusion 32

TABLE OF CASES CITED

Page

Auburn Rubber Co. 156 NLRB 39, 61 LRRM 1033 (1965) 31

Bankers Trust Co. v. Pacific Employers Ins. Co. 282 F 2d 106 1960 (9th Cir C.A.) 25

Bing v. Roadway Express, Inc. 70 LRRM 3043 (N.D. Ga 1968) 10

Bowe v. Colgate Palmolive Co. 272 F Supp 332 (1967) 26, 27, 32

Culpepper v. Reynolds Metals Co. 421 F 2d 888 (5th Cir C.A. 1970) 27, 28

Jenkins v. United Gas Corp. 400 F 2d 28 27

King v. Georgia Power Co. 295 F Supp 943 (N.D. Ga 1968) 28, 29

Leary v. United States 383 F 2d 851 (1967) 14

Medo Photographic Supply Corp. v. Livingston 274 F Supp 209 30

Oatis v. Crown Zellerbach Corp. 398 F 2d 496 (5th Cir C.A. 1968) 27

Quarles v. Phillip Morris, Inc. 279 F Supp 505 (E.D. Va 1968) 10, 22

Raytheon Co. 140 NLRB 883, 52 LRRM 1129 (1963) .. 31

Republic Steel Corp. v. Maddox 379 US 650 (1965) .. 28

Sherbert v. Verner 374 U.S. 398 (1963) 3, 6-8, 10, 12-15

Speilberg Manufacturing Co. 112 NLRB 1980, 36 LR RM 1152 (1955) 31

Steelworkers v. American Int'l Aluminum Corp. 334 F 2d 147 (5th Cir C.A. 1964) 27

Swensen v. Employment Security Commission 340 Mich 430 (1954) 7, 8, 9

TABLE OF CASES CITED (CONT'D)

Page

Torrington Co. v. Metal Products Workers Union Local 1645, UAW, AFL-CIO, 362 F 2d 677 (2nd Cir 1966) 30

United Paper Makers and Paper Workers Local 189 v. United Stattes 416 F 2d 980 (1969) 10, 22, 24, 25

United States v. Kuch 288 F Supp 439 (1968) 14

United States v. Local 189 United Paper Makers and Paper Workers, 301 F Supp 906 (1969) 10, 24

United States v. H.K. Porter Co., Inc. 296 F Supp 40 (N.D. Ala) 24, 29

United States v. O'Brien, 391 US 376 (1968) 15

United Steel Workers v. Warrior & Gulf Nev. Co., 363 US 574 (1960) 28

West Virginia State Board of Education v. Barnette, 319 US 624 .....6, 9, 11, 14

STATUTES AND REGULATIONS CITED

Page

Civil Rights Act of 1964, Title VII

Section 703 (a)(1)
(42 USC §2000e-2(a)(1)) 1, 3, 5, 26, 32

Section 703 (h)
(42 USC §2000e-2(h)) 1, 20, 22, 23, 24, 25

Section 705
(42 USC §2000e-4) 13

Equal Employment Opportunity Commission Guidelines

Section 1605.1 (b)
(29 C.F.R. §1605.1(b)) 3

Section 1605.1 (c)
(29 C.F.R. §1605.-1(c)) 13, 14

Essay:

"Seniority and Equal Employment Opportunity: A Glimmer of Hope" by Alfred W. Blumrosen, 23 *Rutgers Law Rev* 268 ..... 21, 23

QUESTIONS PRESENTED

I.

Does an employer engage in religious discrimination in violation of Section 703 (a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?

A. Reynolds Metals Company violated Section 703 (a) (1) of Title VII (42 USC 2000e-2(1)) by conditioning Dewey's continued employment upon his willingness to forfeit or otherwise compromise his religious beliefs.

B. Reynolds Metals Company did not reasonably accommodate Dewey's religious beliefs considering that Reynolds knew that Dewey's religious beliefs forbade Sunday work or the solicitation of a replacement, and further, considering the availability of other qualified employees.

C. Reynolds' otherwise discriminatory conduct of discharging Dewey for refusing to work on his Sabbath, is not rendered lawful because of the "bona fide seniority system" exception set forth in 703(h) of Title VII (42 USC Section 2000e-2(h).

D. Assuming Reynolds violated Title VII by discharging Dewey because of his religious beliefs, Reynolds' claim of "good faith" cannot deprive the courts of their power to shape and provide a remedy for this violation.

II.

Is an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement is barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge?

A. The doctrine of election of remedies is not applicable to a situation in which the Plaintiff enjoys two separate rights or causes of action.

B. Rights created under a collective bargaining agreement and rights created under Title VII are separate and distinct rights.

STATEMENT OF FACTS

Petitioner has been a member of the Faith Reformed Church since December 4, 1961 (41a, para. 11). His faith — the sincerity of which is not contested — prevents him from working on Sundays or asking anyone to work on Sundays in his stead (42a-43a, para. 16, 17 and 19). Petitioner was employed by respondent at its Wyoming, Michigan, plant since June 14, 1951, and held various jobs at the plant, culminating with the job of "die repairman," until September 12, 1966, when he was discharged (39a, para. 1). The work done at the plant is of a "job type," involving the production of aluminum extrusions and aluminum billets for industries such as architecture, building, transportation, aircraft and missiles (39a, para. 2).

Prior to 1964, the plant operated on a five-day-a-week basis. Subsequently, with increasing volume, the plant's operations were increased to six days a week, with overtime scheduled for a part of the employees on numerous Sundays (39a, para. 3). Under respondent's collective bargaining agreement with UAW, Local 277 (of which petitioner was a member in good standing), respondent had the right to set overtime schedules and compel employees to work overtime "except when an employee has a substantial and justifiable reason for not working." At the request of the union, respondent in 1963 issued an interpretative statement regarding this provision in which it announced that any employee assigned to overtime could be relieved of that assignment by arranging for another qualified employee to replace him. This system of substitution has been utilized "extensively" in respondent's plant since 1965 in many situations.

Petitioner was first assigned to Sunday overtime work on November 21, 1965, and he refused to work then because of his religious beliefs. He was admonished and told that a repetition of such conduct would lead to disciplinary action. On at least five occasions between January and August, 1966, petitioner was assigned to Sunday overtime work and obtained a replacement. On August 28, 1966, petitioner was again assigned Sunday work, and he refused to request a fellow employee to substitute for him on the ground that the making of such a request would violate his religious beliefs. The same sequence of events occurred with respect to Sunday assignments on September 4 and 11, 1966. On account of these absences, petitioner was discharged from employment on September 12, 1966, (42a-43a, para. 16, 17 and 19). Petitioner had volunteered for overtime on days other than Sunday (42a, para. 13).

In addition to pursuing various remedies under the labor contract and local civil rights statutes, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that he was the victim of religious discrimination. The Commission (overruling a recommendation of a regional director) found that there was reasonable cause to believe that respondent had engaged in religious discrimination, and it instituted conciliation efforts. When conciliation failed, petitioner began this action in the district court, by filing his complaint based on §703 of Title VII of the Civil Rights Act of 1964 (42 USC §2000e-2 (a) (1)) (47a, para. 33).

On the merits, the district court held that respondent had violated Section 703 (a) (1) of the Civil Rights Act of 1964 by discharing petitioner on account of his refusal to work on Sunday or obtain a replacement (89a-103a). The court relied on the interpretative regulation issued by the Equal Employment Opportunity Commission, which requires employees "to make reasonable accommodiations to the religious needs of . . . employees where such accommodations can be made without undue hardship on the conduct of the employer's business." 29 C.F.R. §1605.1 (b) . The court noted that, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), the petitioner had "been forced to choose between his religion and his job." The court also found

that respondent had made "no accommodation whatsoever" to petitioner's religious belief that asking anyone to work on Sunday, in his place "would be as much a sin as working himself on Sunday" and that, under the applicable regulation, respondent had failed to demonstrate "any undue hardship" in accommodating to petitioner's request not to work on Sundays (97a-102a).

A majority of the court of appeals (Weick and O'Sullivan, J.J.) reversed on the ground that there was "nothing discriminatory" in respondent's conduct with respect to petitioner (128a). The majority judges viewed the application of the Equal Employment Opportunity Commission interpretative regulation as *ex post facto* since it was not issued until July 10, 1967 (131a). They also concluded that sufficient accommodation under the regulation had been made by respondent when it generally authorized the use of replacements — a privilege which, according to the majority, petitioner "stubbornly refused to exercise" (132a).

The majority also held that petitioner's district court action was barred because he had initially elected to pursue the arbitration remedy available under the collective bargaining agreement (134a-136a). Circuit Judge Combs dissented on the ground that the respondent had made "no showing" of disruption of work at the plant by accommodation to petitioner's demands and that the Commission's regulation required such an accommodation (136a-140a).

A timely petition for rehearing and suggestion for rehearing *en banc* were filed. Rehearing *en banc* was denied, with Circuit Judges Edwards and McCree dissenting (140a). Consideration of the petition for rehearing by the initial panel resulted in its denial, with the majority stating that "(t)he requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act" (141a). Circuit Judge McCree, (designated by the Chief Judge to substitute for Judge Combs, who had resigned since the original panel decision) dissented for the reasons stated in Judge Combs' opinion (141a).

ARGUMENT

I.

Does an employer engage in religious discrimination in violation of Section 703 (a) (1) of the Civil Rights Act of 1964 if he refuses to make reasonable accommodations to the religious observance of a weekly day of rest by an employee?

A.

Reynolds Metals Company violated Section 703 (a) (1) of Title VII (42 USC 2000e-(1)) by conditioning Dewey's continued employment upon his willingness to forfeit or otherwise compromise his religious beliefs.

Section 703(a)(1) (42 USC Section 2000e-3(a)(1)) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> (1) "To fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin; or".

From a reading of this Section of the Statute, there are two (2) initial steps which must be taken to determine whether there has been a violation; (1) Has the employer done some act, either failed or refused to hire or discharged an individual or otherwise discriminated against an individual and; (2) Was this act or other discrimination because of the individual's race, color, religion, sex or national origin?

In the instant case, there is no dispute that Reynolds discharged Dewey (43a, para. 19). The remaining question is

whether or not this act of discharging Dewey was because of his religion and therefore contrary to the statute.

Implicit in the language of the statute is a definition of discrimination which makes the discharge of an individual, because of his religion, discrimination prohibited by the statute.

There is no dispute that Dewey's religious beliefs are sincere (45a, para. 24); and there is no dispute that Dewey had made known his religious beliefs against Sunday work and against soliciting replacements to Reynolds prior to having been scheduled for the three (3) Sundays in 1966 (45a, para. 25).

Out of the eleven plus men qualified for die-repair, only Dewey was singled out and required to forego his religious beliefs in order to retain his job. No other employee in Dewey's job classification was required to make such a choice between his job and his religion.

Several recent cases have presented the Courts with circumstances in which an individual has been forced to choose between two rights or benefits. When an individual is forced to make the choice of exercising one right at the expense of another, he is penalized for exercising that right.

In *West Virginia, State Board of Education v. Barnette*, 319 US 624, 63 S Ct 1178, 87 L Ed 1628, this Court had before it a situation in which the individual's exercise of one right, the right to attend Public Schools, was conditioned upon the sacrifice of another right, the right to religious freedom. In the *Barnette* case, the West Virginia State Board of Education required that all school children salute the flag as part of their daily school routine. A student who did not comply with this requirement was subject to expulsion from the school system. The *Barnette* case involved a student whose religious beliefs forbade him to salute the flag.

In *Barnette*, this Court held that this requirement of the West Virginia State Board of Education, when applied to those students whose religious beliefs forbade saluting the flag, ran afoul of the Constitution.

Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d 965 (1963) involved the same type of "choice" as dis-

cussed above. In the *Sherbert* case, the Appellant had been denied unemployment compensation by the State of South Carolina because she would not accept employment on Saturday because of her religion. The State Unemployment Commission therefore determined that the appellant was ineligible for unemployment compensation because she was not available for work. In other words, the appellant's right to continue receiving unemployment compensation was conditioned upon her willingness to sacrifice or compromise her religious beliefs which forbade Saturday work. In holding that South Carolina's denial of unemployment compensation to the appellant was unconstitutional, this Court said:

> "Here not only is it apparent that appellant's declared ineligibility for benefits derived solely from the practice of her religion, but the pressure on her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand." (374 US 398, 404, 10 L Ed 2d 965, 970)

Later in the Court's opinion, again addressing itself to the matter of conditioning the exercise of one right or the continued receipt of a benefit upon the sacrifice or compromise of another, the Court said:

> "Likewise, to condition the availability of the benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." (374 US 398, 406; 10 L Ed 2d 965, 971)

The facts in a recent case before the Michigan Supreme Court were similar to those in the case of *Sherbert v. Verner*. In *Swenson v. Employment Security Commission*, 340 Mich 430 (1954), the Court had before it a case in which the Employment Security Commission of the State of Michigan had denied unemployment compensation to a member of the Seventh Day Adventist religion. The basis

for the disqualification of unemployment benefits was the refusal of Bessie Swenson (and others) to accept any employment involving Saturday work. For members of the faith of the Seventh Day Adventists, Saturday is their Sabbath and work is forbidden on this day. The Michigan Supreme Court, in approving the opinion of the trial Judge, in the *Swenson* opinion, quoted the opinion of the trial Judge as follows:

> To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them." (340 Mich 430, 437, 438.)

Considering the above cited cases, and the numerous cases cited therein, it cannot be seriously doubted that conditioning the exercise of one right or the receipt of a benefit upon an individual's willingness to sacrifice another right, for example, his religious beliefs, is an invalid interference with the constitutionally and statutorily protected right of religious freedom.

Yet, notwithstanding all of the above cited authorities, Reynolds, in the instant case, argues that because it applied the rule of compulsory Sunday overtime for all employees uniformly, it cannot be guilty of an act of discrimination contrary to the Civil Rights Act of 1964.

In each of the above cited cases, as in the instant case, the uniform application of a rule or requirement was struck down because its *effects* were discriminatory; and in each case, the discrimination was on the basis of the individual's religious beliefs. It is true that in each of the cases discussed above, the rule which was struck down did not, on its face, discriminate, as for example, the requirement that Negroes sit in the rear of the buses would be discriminatory, or as for example, the requirement that Jewish students pay twice as much tuition in order to

attend a given school would be discriminatory. In the *Barnette* case, the school board required *every* student to salute the flag or suffer expulsion. In the *Sherbert* case and in the *Swenson* case, the State Unemployment Commissioners said that *everyone* must be willing to work Saturdays or be denied unemployment compensation. However, it was not the requirement itself that was discriminatory in these cases; but rather, the *effect* of the requirement that was discriminatory. It was only those individuals whose religious beliefs forbade flag saluting or Saturday work who were discriminated against. The discrimination, under these circumstances, results from exacting a penalty from those individuals who hold a religious belief which does not permit compliance with the uniformly applied rule.

The individual whose religious beliefs permit him to work any day of the week is not forced to make a choice between unemployment compensation or his religious beliefs. Similarly, the individual whose religious beliefs permit saluting the flag is not forced to make a choice between his education or his religious beliefs. For the individual whose religious beliefs permit compliance with the uniformly applied rule, there is no penalty exacted for compliance. However, the individual whose beliefs forbid Saturday work or flag saluting must make a choice, and regardless of the choice that he makes, he loses something.

Robert Dewey, in the instant case, holds religious beliefs which prevent him from working on Sunday, and likewise forbid him to solicit a replacement. The employer in the instant case, contends that it has the authority, under a Labor Agreement in effect since 1960, to require all employees to work overtime including overtime on Sunday. The employer exercised its authority to compel overtime by requiring Dewey to work on three (3) Sundays in 1966. Dewey's refusal to comply with this rule, as to overtime assignments on his Sabbath, resulted in his discharge. Under such circumstances, Dewey was faced with a choice; he could forfeit his right to continued employment, or he could forfeit or compromise his religious beliefs. Dewey followed his faith and was discharged from employment with Reynolds Metals Company.

While *Sherbert* was not a case involving the Civil Rights Act of 1964; but rather a case involving "the free exercise clause" of the Constitution, nonetheless, that case does establish an important principle applicable to cases dealing with the Civil Rights Act of 1964. This principle is the recognition by the Court in *Sherbert* of the fact that a uniformly applied rule may have unequal effects which unequal effects may render the rule invalid although uniformly applied.

This principle has been carried forward into the Civil Rights area. *Bing vs. Roadway Express, Inc.* 70 L.R.R.M. 3043 (N.D. Ga) (1968) in which the Court said that a seniority system might itself be discriminatory where accumlated seniority credits could not be transferred from the "standby class" where black workers had traditionally been situated, to the "on the road" class where whites predominated, even though there was no racial impediment as such to transfer from one class to the other. Both *Quarles vs. Phillip Morris, Inc.*, 279 F Supp 505 (ED Va 1968) and the *United Paper Makers and Paper Workers Local 189 v. United States* 416 F 2d 980 (1969) held that a seniority system violates the Civil Rights Act of 1964 if its effects are discriminatory even though it may appear fair on its face.

The concept of exacting a price from an individual for that individual's exercise of a right while no such price is exacted from another in the same class is discussed in a recent case, *US v. Local 189 United P & P AFL-CIO* CLC, 301, F Supp 906 (1969), affirmed, 5th circuit, 416 F 2d 980 (71 LRRM 3070). The *Local 189* case did not involve religious discrimination. However, in addressing itself to the concept of different treatment to members of the same class, where the different treatment is based upon the individual's race, the Court said:

> "Consistent with these two safeguards, however, removal of any structural impediments which delay the attainment by Negroes of jobs generally as good as those held by their white contemporaries or which require Negroes to pay a price for those opportunities

are required by law to be removed." 301 F Supp 906, 917 (1969).

In the instant case, it is agreed that Dewey was the only employee in the die-repair classification whose religious beliefs forbade work on Sundays and whose religious beliefs forbade him from soliciting a replacement in accordance with a replacement system (46a, para. 28). It is also agreed that on each of the occasions when Dewey was assigned to work on Sundays, notwithstanding his religious beliefs, there were from 4 to 7 qualified employees in die-repair classification whose religious beliefs did not forbid them Sunday work; and all of these employees were available for such overtime assignments. Notwithstanding all of that, Dewey was the only employee required to compromise or forfeit his religious beliefs or alternatively lose his job. Clearly, within the meaning of all of the aforementioned cases, the imposition of such a choice upon only one member of that classification is an act of discrimination based solely upon Dewey's religious beliefs.

Reynolds also argues that since its act of assigning Dewey to work Sunday overtime was pursuant to the Labor Agreement, that such conduct is immune from challenge under the Civil Rights Act of 1964. The argument that a contract between private institutions can vitiate or negate a fundamental right such as religious beliefs, protected by Congress in the Civil Rights Act, is inconsistent with the decided cases. The Court in *West Virginia Board of Education v. Barnette,* 319 US 624, 63 S Ct 1185, in addressing itself to the matter of fundamental rights such as freedom of religion, said:

> "One's right to life, liberty, property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights *may not be submitted to a vote;* they depend on the outcome of no elections." 319 US 624, 638, 63 S Ct 1178, 1185 through 1186 (Emphasis added.)

Aware of the evergrowing number of threats to the individual's fundamental freedoms in the Twentieth Cen-

tury, Congress passed the Civil Rights Act of 1964. As a result of the enactment of this law, such a fundamental right as freedom of religion has broader protection than previously. In passing the Civil Rights Act of 1964, Congress recognized that such a fundamental right as freedom of religion may be denied, not only by governmental action but also by the acts of private employers.

Reynold's act of discharging Dewey because he refused to work on his Sabbath when Reynolds knew that Dewey's religious beliefs forbade work on his Sabbath, and when there were several alternative employees who could have worked without violating their religious beliefs, is discrimination against Dewey on the basis of his religion.

This Court in the cases involving state restriction of the free exercise of religion has used an approach which balances the free exercise of religion rights against the state's interest in regulating the activity. *Sherbert v. Verner* illustrates this:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitations' Thomas v. Collins, 323 US 516, 530, 89 L Ed 430, 440, 65 S Ct 315." (page 407)

What the regulations promulgated by the EEOC obviously strive to do is to parallel this Court's approach in cases where state action restricts the free exercise of religion, in interpreting the Civil Rights Act of 1964 prohibition of discrimination on the basis of religion. The requirement that an employer accommodate an employee's religious needs if such accommodation does not create undue hardship requires an inquiry into the degree of employer hardship similar to the inquiry into the compelling state interest required to infringe the constitutional right

of free exercise of religion. And as *Sherbert* places the burden of showing the compelling state interest on the state, so the regulation places the evidentiary burden of showing undue hardship upon the employer.

The regulation is an appropriate interpretation of the Civil Rights Act of 1964 in using an approach similar to this Court's approach in the constitutional cases. Even though the statute speaks of discrimination on the basis of religion and the constitution provides for free exercise thereof, the similarity is that in each case religion is singled out for protection and the regulations are reasonable in finding that congress intended the same protection from employers in the Civil Rights Act as is provided by the constitution against government action.

The earlier regulation used the expression, "serious inconvenience" while the latter regulation uses "undue hardship." On the facts of this case, there is no different result; the facts show neither undue hardship nor serious inconvenience.

B.

Reynolds did not reasonably accommodate Dewey's religious beliefs considering that Reynolds knew that Dewey's religious beliefs forbade Sunday work or the solicitation of a replacement, and further considering the availability of other qualified employees.

As pointed out by the District Court in its Opinion (94a):

> "To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC 2000e-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act."

The District Court cited Section 1605.1 (c) of the Regulations regarding religious discrimination (95a):

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable".

This regulation essentially suggests a balancing of interests and consideration of alternatives when faced with a possible conflict between an employer's interests and the religious interests or needs of an employee or applicant.

While religious beliefs, in the sense of the intellectual thoughts are absolutely protected by the Constitution, the Courts have rejected the statement that all overt actions or practices, based upon religious beliefs, are free from restrictions. *Sherbert v. Verner*, 374 US 398, 402, 403, 10 L Ed 2d, 965, 970, 83 S Ct 1790. However, the Courts have held that when such fundamental rights as those guaranteed by the First Amendment are subjected to restrictions, it must be to prevent grave and immediate danger to the interests which the state may lawfully protect. *West Virginia's State Board of Education v. Barnette*, 319 US 624, 639, 63 S Ct 1178, 1186. Two recent cases demonstrate this point. The cases of *Leary v. United States*, 383 F 2d 851 (1967) and *United States v. Kuch*, 288 F Supp 439 (1968) involved a claim by criminally accused Defendants that their use of narcotics and other unlawful drugs was an essential aspect of their religious beliefs. The court, in upholding their convictions, discussed the principles of *Sherbert v. Verner*. The Court pointed out that while the constitutionally guaranteed right of free exercise of religion imposes upon the government the burden of showing a compelling state interest in its abridgment, in the cases of these narcotics users, the government had met this burden.

As Dewey has argued above, the fundamental religious freedoms guaranteed by the First Amendment are the same freedoms or interests which the Civil Rights Act of 1964 seeks to protect. Therefore, the reasoning applied by the Courts in the cases dealing with governmental action which affects or restricts religious freedom is applicable and rele-

vant to the Court's determination of the instant case involving an employer's abridgment of religious rights contrary to Title VII of the Civil Rights Act of 1964.

Whenever the Courts have dealt with a case involving a conflict between fundamental rights such as religious beliefs on the one hand, and a state interest on the other hand, two basic questions are always asked: The first question is, what is the purpose of the law or rule which abridges a fundamental right? The second question is whether that purpose or objective can be achieved in an alternative manner so as not to abridge or infringe upon the fundamental right. See *United States v. O'Brien,* 391 US 376, 88 S Ct 1679 (1968) 20 L Ed 2d 672.

United States v. O'Brien involved an individual accused of the crime of burning his draft card. In this case, the Court held, as unconstitutional, the statute passed by Congress which made it a criminal offense to burn a draft card. The Court pointed out that the free speech elements involved in the course of conduct of burning a draft card were sufficiently protected by the First Amendment to require an important governmental interest in regulating such conduct. The Court pointed out that there was not sufficient governmental interest shown to justify the restrictions upon the fundamental right of freedom of speech that is associated with the act of burning a draft card. The relevant point of the *O'Brien* case is that in striking down the statute, the Court noted that regardless of the purpose of the statute, the result of burning a draft card was already subject to criminal prosecution because after one burned his draft card, he would be in violation of the law requiring registrants under the Selective Service Act to be in possession of their draft card. In other words, the government could achieve its objective without abridging the right of free speech. The burden on the government to show a compelling or substantial interest in order to sustain the abridgment of some aspect of the freedom of religion was similarly discussed in *Sherbert v. Verner,* 374 US 398, 83 S Ct 1790.

The same reasoning that is set down in *O'Brien, Sherbert,* and other cases, is applicable to the relationship between the employer and the employee. The test is basically

one of comparing and balancing the interests of each party. Whenever a situation arises in which a fundamental right, such as religion which is protected by the Civil Rights Act, is in danger of being abridged as a result of some action or policy of an employer, the Court should determine what the employer's objective or interest is in compelling obedience to a particular company rule or other company policy. If an employee's fundamental right, such as his religion, is abridged by some act of the employer, it is only reasonable that the employer be required to alter his conduct if he can serve his interests in a manner that does not abridge the fundamental right of an employee. In other words, whenever a fundamental right such as one's freedom of religion is discriminated against or abridged, it first becomes the duty of the employer to accommodate the fundamental right of the employee by seeking a reasonable alternative means to achieve his objective.

Applying this analysis to the facts in the instant case, the first question is whether or not Reynold's requirement that Dewey work overtime on Sundays, or face expulsion, discriminated against, or abridges Dewey's religious beliefs. The answer to this question is quite evident. Dewey's religious beliefs forbade him from working on Sunday, the Sabbath of his religion, and those same religious beliefs forbade him from soliciting a replacement for such Sunday assignments. Since it was Reynold's requirement that Dewey either work on Sunday or find a qualified replacement, and since Dewey's religious beliefs forbade him from doing either, he was forced to compromise his religious beliefs or forfeit his job. The discriminating effects of Reynold's action are demonstrated by the fact that Dewey was the only die-repairman who was forced to ferfeit his job in order to follow his religious beliefs. Dewey was penalized for holding religious beliefs forbidding work on one day of the week.

Having determined that Reynold's action in compelling Sunday overtime will infringe upon Dewey's religious beliefs, the next step is to determine the employer's interest or objective in compelling Sunday overtime from the employee. The apparent answer to this question is that Rey-

nolds required the services of die-repairmen on the Sundays that it scheduled Dewey to work. The employer needed the services and skills of die-repairmen on these Sundays in order to maintain a production schedule. Thus, the next question is whether or not, in order to respect and safeguard the religious beliefs of Dewey, Reynolds could have achieved the production it sought to maintain on those Sundays without Dewey. In other words, what could Reynolds have done on these particular occasions to accommodate Dewey's religious beliefs?

One way in which Reynolds might have accommodated Dewey, assuming the employer needed an additional eight (8) hours work from a die-repairman would have been to require Dewey to work two (2) hours overtime for four (4) days during the week; or alternatively, four (4) hours overtime for two (2) days. Clearly, this is the one way in which Reynolds could have accommodated Dewey's religious beliefs, and at the same time Reynolds would have obtained the additional overtime which it required. However, the record does not show whether this could have been done. It should be noted that Reynolds never even attempted any accommodation.

A second alternative by which Reynolds could have accommodated Dewey's religious beliefs is a simple one. Examination of Paragraphs Nos. 16, 17 and 19 of the Fact Stipulation (42a, 43a, and 44a) filed herein reveals the following:

On the first Sunday that Dewey was scheduled to work overtime (August 28, 1966) seven (7) of eleven (11) employees in the die-repair classification worked. Therefore, there were *four* (4) other employees, qualified to do the work of a die-repairman, who were available to work on the first Sunday.

On the second Sunday that Dewey was scheduled to work overtime (September 4, 1966) four (4) of eleven (11) employees in the die-repair classification worked. Therefore, there were seven (7) other employees, qualified to do the work of a die-repairman, who were available to work on the second Sunday.

On the third Sunday that Dewey was scheduled to work overtime (September 11, 1966) five (5) employees in the

die-repair classification worked. Therefore, there were (6) other employees, qualified to do the work of a die-repairman, who were available to work on the third Sunday.

As appears in the Fact Stipulation, (46a, para. 28) no other employee in Dewey's classification held religious beliefs which forbade him from both working on Sunday and soliciting a substitute.

Paragraph No. 9 of the Fact Stipulation (41a) discloses that the employer issued an interpretation of the Labor Agreement of 1965 which permitted an employee to be relieved of an overtime assignment by arranging for another qualified employee to replace him. Reynolds contends that the system described in Paragraph 9 (41a) constituted reasonable accommodation of the religious beliefs of its employees. Perhaps this is true as to those employees whose religious beliefs did not conflict with such a replacement system, but it is not true as to Dewey.

There are two reasons why Reynold's interpretation of the Labor Agreement is not accommodation of Dewey's religious beliefs:

1. Reynolds contends that it should be the duty of the employee to find a substitute. However, it is against Dewey's religious beliefs to solicit such a replacement to work in his place.

> "Remember the sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work; but the seventh day is a sabbath unto Jehovah thy God: *in it* thou shalt not do any work, thou, nor thy son, nor thy daughter; thy man-servant, nor thy maid-servant, nor thy cattle, nor thy stranger that is within thy gates;" (Exodus 20.8-10)

2. An employee has no power to direct another employee to work in his place. If no volunteers are forthcoming, the employer, under the Labor Agreement, can compel the employee to work the overtime required. Furthermore, the employer, and not the employee, has the authority to accept the services of a volunteer and determine that they are suitable for the job to be done.

At no time has Reynolds shown any reason why it could not have assigned overtime in such a manner that Dewey would not have been required on Sundays. At no time has Reynolds shown any reason why it could not secure a replacement for Dewey except the reason given as a defense in stipulation No. 23 (45a para. 23) and as set forth in Defendant's Answer No. 24 to Plaintiff's Interrogatory No. 24 filed herein. (27a)

Reynolds admits by implication, that it did not accommodate Dewey as indicated in its answer No. 24 to Plaintiff's Interrogatories (27a).

Plaintiff's Question No. 24 (22a) was "What is the Defendant's reason for refusing to find substitute employees to work overtime on Sundays so as to accommodate other employees' religious beliefs?" Reynolds answered (28a) ". . . If such were done for Dewey, as an accommodation, the same would have to be done for other employees who requested relief for various reasons in order to have impartial administration of the contract. . ."

However, it should be recalled that the Civil Rights Act of 1964 prohibits discrimination on the basis of religion; but the statute does not afford protection for the variety of excuses that the employees might urge upon the employer in an attempt to avoid overtime.

The defect in Reynold's position is the assumption that if it accommodates Dewey's religious beliefs, then it must accommodate other employees for *other* reasons. The Civil Rights Act of 1964 and the Regulations do not prevent an employer from abridging an employee's belief that he ought to play golf on Sunday. The Civil Rights Act of 1964 protects certain, specific fundamental rights including freedom of religion; golf for example, is not so protected.

Reynolds could still compel overtime work if it accommodated Dewey's religious beliefs. It could compel employees to work when they would not volunteer. The only restriction on the employer would be that it could not abridge or discriminate against its employee's rights protected by the Civil Rights Act.

In addition to the extra four (4), seven (7) and six (6) qualified employees who did not work on the re-

spective Sundays, Paragraph No. 22(a) and (b) of the Fact Stipulation (44a) reveals that there were two (2) additional employees, not in Dewey's classification who were also qualified to do the job of a die-repairman. While Reynolds could not compel either of these two (2) employees to work outside their classification on Sundays, it is clear that they were available for work, on a volunteer basis. Paragraph No. 22(a) of the Fact Stipulation (44a) states that the employee Jake Zagman did not work on September 11, 1966, and was available for work. Paragraph 22(b) of the Fact Stipulation (44a) states that William Boyer, subsequently reclassified into Dewey's classification, did not work on September 4, 1966 and was available for work.

A comparsion of the above-described means, by which Reynolds could have accommodated Dewey's religious beliefs, with the practice actually followed Reynolds, shows that Reynolds did nothing to accommodate Dewey's religious beliefs.

C.

Reynolds otherwise discriminatory conduct of discharging Dewey for refusing to work on his Sabbath, is not rendered lawful because of the "bona fide seniority system" exception set forth in 703 (h) of Title VII (42 USC Section 2000e-2(h).

Reynolds argued in the Court below that its conduct in discharging Dewey for his refusal to work overtime on his Sabbath is not a violation of Title VII, because such conduct falls in the scope of Section 703(h). This section provides an exemption, the substance of which is that it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions or privileges of employment pursuant to a *bona fide seniority or merit system* provided that such differences are not the result of intention to discriminate because of race, color, religion, sex or national origin. Typically, the context to which this exception was

intended to apply is a situation where a cutback in needed manpower occurs, and the most recently hired employees are laid off or fired.

Another common context with which the seniority system deals, is the situation where there are various advancements available and the opportunity to fill these vacancies is given to the employees with the greatest seniority first. These are the situations to which the exception was intended to apply and such is not the situation which exists in the instant case.

In the instant case, Dewey was not discharged because he was "low man on the totem pole"; but rather, he was discharged because of his religious beliefs.

Professor Alfred W. Blumrosen, of Rutgers University School of Law, was Chief of Conciliations for the U.S. Equal Employment Opportunity Commission 1965 through 1967, and has an extensive background in Civil Rights Law. In a recent article by Professor Blumrosen entitled "Seniority and Equal Employment Opportunity: A Glimmer of Hope" *23 Rutgers Law Rev.* 268 (Winter 1969), Professor Blumrosen discusses the Civil Rights Act of 1964, Title VII, and specifically the *bona fide seniority system exemption.* While his principal concern in this article is race discrimination, Professor Blumrosen states at *23 Rutgers Law Rev.*, 268, 290:

> "The evidence in a Title VII suit should not range over the 57 varieties of seniority in a given industry in disregard of the day-to-day operation of the particular system before the Court. If *that* system discriminates, then it is not protected by the 'bona fide' provision. It is no defense that a similar system might operate in a non-discriminatory manner."

Later at Page 291, Professor Blumrosen says:

> "What, then, does the 'bone fide seniority system' language mean? The proviso crystallizes the concern of Congress to protect earlier hired whites against later hired Negroes; and beyond that, it means only what it says: that it does not insulate seniority systems which operate in a discriminatory manner, . . ."

'The Fifth Circuit Court of Appeals, in affirming the District Court in *Local 189 v. U.S.*, 416 F 2d 980 (71 LR RM 3070) quoting from *Quarrels v. Phillip Morris, Inc.*, (E.D. Va. 1968) 279 F Supp 505, 217:

> "Section 703(h) expressly states the seniority system must be 'bona fide'. The purpose of the act is to eliminate any racial discrimination in covered employment. Obviously, one characteristic of a 'bona fide' seniority system must be a lack of discrimination." 416 F 2d 980, 988 (1969), 71 LRRM 3070, 3075.

Therefore, even if the facts in the instant case did lend themselves to 703(h) application, the effect of the application being discriminatory Reynolds cannot claim immunity from the charged violations on the basis of Section 703(h) because the system would not be bona fide.

The exception set forth in Section 703(h) is not applicable to the facts in the instant case. However, if the Court should consider that the exception is applicable to the facts in the instant case then Dewey contends that any seniority system which has as one of its effects religious discrimination is not a *bona fide seniority system;* and therefore Reynolds is not entitled to claim the immunity provided by Section 703(h). For all of these reasons, the argument that the Section 703(h) exemption applies to the instant case must be rejected.

D.

Assuming Reynolds violated Title VII by discharging Dewey because of his religious beliefs, Reynolds' claim of "good faith" cannot deprive the courts of their power to shape and provide a remedy for this violation.

Reynolds argued that if the Court found that Reynolds did violate Title VII of the Civil Rights Act in discharging Dewey, that such a violation was in "good faith" reliance on the Labor Agreement between employer and UAW and therefore employee-Dewey is not entitled to injunctive relief, back pay or reinstatement. What Reynolds is urging

upon the Court is that even if the Court finds that Dewey's rights were violated contrary to Title VII, it cannot afford any meaningful remedy if the Court finds that Reynolds relied on the Labor Agreement. In support of this contention, Reynolds cites Section 706(h) of Title VII and argues that it is necessary that the employer *intentionally* engaged in an unlawful employment practice in order to enjoin such practice or afford other affirmative relief.

In addition to the discussion in Professor Blumrosen's article set forth above, Professor Blumrosen refers to the word *intent* in the remedial section of Title VII:

> "The word 'intent' was inserted into the remedial section of Title VII as part of the 'Dirksen Amendments' which constituted the Senate-House compromise bill which was enacted into law. Senator Humphrey called this edition a 'clarifying change'. He said:
>
> 'Since the title bars only discrimination because of race, color, religion, sex or national origin, it would seem already to require intent, and thus, the proposed change does not involve an substantive change in the title. The express requirement of intent is designed to make it wholly clear that *inadvertent or accidental discriminations* will not violate the title or result in entry of court order. It means simply that the Respondent must have intended to discriminate.' " (emphasis added) *23 Rutgers Law Rev* 268, 282

Further, Professor Blumrosen states:

> "Thus, the intent requirement in Title VII is the intent requirement of a civil action in tort — that the Defendant be aware of the consequences of his action which are reasonably certain to flow from his behavior. If he has this level of awareness, the law of tort is satisfied that he intended the consequences." *23 Rutgers Law Rev* 268, 283

Since Reynolds was fully aware of Dewey's religious beliefs and notwithstanding assigned him to Sunday work and discharged him for his refusal to work on Sunday,

there can be no doubt that the intent required under the remedial section (Section 703(h)) was met.

The matter of intent was also before the United States District Court in *U.S. v. H. K. Porter Company, Inc.*, 296 F Supp 40 (N.D. Ala.) where the Court said:

> "One of the issues framed by the pre-trial order is the question of 'whether the defendant Company has had the intent which Section 707 of Title VII requires the Plaintiff to prove to establish a violation.' " 296 F Supp 40, 115.

While Sections 707 and 703 are different inasmuch as the 707 Section is an Action by the United States through the Attorney General's office, the Court in *H. K. Porter Co.* stated the following regarding *intent*:

> "At the outset, the basic thesis of the Attorney General's position on this issue is the argument that 'the best of motives will not save an employer or Union which has violated the statute.' The argument has an element of question-begging, since the question of intent enters into the determination of whether an Employer or a Union has violated the statute. *Nevertheless, the Court agrees in principle with the argument.*" (296 F Supp 40, 115) (emphasis added)

While speaking in a somewhat different context, the United States District Court in *U. S. v. Local 189 United P. & P.* 282 F Supp, 39, 45 stated:

> "But we cannot permit the Plaintiffs herein to remain without a remedy to present and continuing discrimination merely because the remedy called for involves matters which may be subject to the bargaining efforts of Unions. Title VII provides for the *correction of discriminatory practices by any remedial order which may be necessary.*" (emphasis added)

The Fifth Circuit Court of Appeals in *Local 189 v. U.S.*, 416 F 2d 980, (71 LRRM 3070), stated:

"Section 706(h) limits injunctive (as opposed to declaratory) relief to cases in which the Employer or Union has *intentionally engaged* in an unlawful employment practice. Again, the statute, read literally requires only that the Defendant meant to do what he did, that is, his employment practice was not accidental. The relevant legislative history, quoted in the margin, bears out the language of the statute on that point." (416 F 2d 980, 996; 71 LRRM 3070, 3082.)

Therefore, the relief ordered by the District Court in this case was proper and in accordance with the provisions of Title VII.

II.

Is an employee who has sought arbitration on his claim of wrongful discharge under the labor agreement barred from bringing an action in a federal district court under the Civil Rights Act of 1964 arising out of the same discharge.

A.

The doctrine of election of remedies is not applicable to a situation in which the Plaintiff enjoys two separate rights or causes of action.

The doctrines of res adjudicata and election of remedies derive from the same policy, which is, that once an issue has been litigated to a conclusion, there should be an end to the matter. However, the cases setting forth the essential circumstances necessary for invoking the doctrine of election of remedies make it clear that *the doctrine only applies when there is but one cause of action, one right infringed, and one wrong to be redressed.* The doctrine of election of remedies does not require an election between separate and distinct causes of action. See *Bankers Trust Company v. Pacific Employers Ins. Co.*, 282 F 2d 106, 110 (1960 C.A. 9th Circuit) in which case the Court said, "However, this doctrine of election of remedies applies only to

choosing between different remedies allowed by law on the same state of facts, where the party has put one cause of action, one right infringed, one wrong to be redressed."

B.

Rights created under a collective bargaining agreement and rights created under Title VII are separate and distinct rights.

The rights which Dewey sought to vindicate through the grievance — arbitration procedures are rights which were created under the collective bargaining agreement between Reynolds Metals Company of Grand Rapids, Michigan, and the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW-AFL-CIO and Local 227. The rights which Dewey seeks to vindicate in this civil action derive from Title VII of the Civil Rights Act of 1964 as amended (42 USCA 2000 e-2). It is clear that contract rights are distinct rights and provide distinct causes of action or remedies from the rights and causes of action which derive from federal statutes. As the Court in *Bowe v. Colgate Palmolive Company,* 272 F Supp 332 (1967) said at Page 337:

> "The Court finds a fundamental difference between a claim for the violation of a collection bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the Court that an employee has the right to come before the Court and assert his claim under the Civil Rights Act of 1964, without regard to any contractual remedies also available to him."

Dewey concedes that the District Court in the *Bowe's* case went on to decide against the Plaintiffs, and requiring Plaintiffs to elect. This holding was contrary to the Court's reasoning as hereinbefore quoted. However, on appeal

to the United States Court of Appeals for the Seventh Circuit *Bowe v. Colgate Palmolive Company* (USCA, 7th Cir. Sept., 1969) 416 F 2d 711, the Court of Appeals reversed the lower court. The Court, stated at 416 F 2d 711, 714:

> "The first major issue for our consideration is whether the trial court acted properly in requiring Plaintiffs to elect whether they would pursue their statutory remedy in this action or seek arbitration of grievances under the collective bargaining contract. Thus, the Court required an election of remedies prior to any decision on the merits in either of the available fora.

The Court went on to say with respect to this point, at 416 F 2d 711, 715:

> "While we recognize that there is a burden placed on the Defendant who must defend in two different fora, we also note that there may be crucial differences between the two processes and the remedy afforded by each. Also, as with unfair labor practice cases, in a case involving an alleged breach of a contract brought before an arbitrator, the arbitrator must consider himself bound to apply the contract and not to give the types of remedy which are available under the statute. Conversely, an action in Court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through the contract, e.g., backpay prior to the date of the statute. *Steelworkers v. American Int'l Aluminum Corp.*, 334 F 2d 147, 56 LRRM 2682 (5th Cir. 1964), and cases cited Supra Note 1. Moreover, in an action brought under Title VII, the charging party and suing Plaintiff acts as a private attorney general who takes on the mantle of the sovereign. *Jenkins v. United Gas Corp.*, 400 F 2d 28, 32, 1 F.E.P. cases 364 (5th Cir 1968). See also *Oatis v. Crown Zellerbach Corp.*, 398 F 2d 496, 1 F.E.P. Cases 328 (5th Cir 1968)."

Another case dealing with the issue of the effect of an arbitration in a case such as the present case is *Culpepper*

v. Reynolds Metals Company, 421 F 2d 888, 61 L.C. 6995-5 (U.S.C.A. 5th Cir January 8, 1970). This case did not involve religious discrimination, but rather a claim of race discrimination. However, the Court did address itself to the issue of the effect of a prior arbitration at 421 F 2d 888, 892, wherein the Court stated:

> "In *Dewey v. Reynolds Metals Company* 291 F Supp 786, the Plaintiff, Dewey, a member of the Reformed Church brought an action under Title VII alleging that he had been discharged because of his religious beliefs. This charge was brought after Dewey had exhausted his contractual remedies including a hearing by an arbitrator and after he had exhausted his state remedies under Michigan Law. * * *. This specific question before the Court was whether Dewey's election to travel the contractual remedies route barred him from his Title VII rights. The Court, in answering * * *, stated that: 'It is understandable that any Union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first, therefore, through arbitration, is in accord with Federal Labor Law. *Republic Steel Corp. v. Maddox* (51 LC §19 458) 379 US 650 (1965), *United Steel Workers v. Warrior & Gulf Nev. Co.*, 40 LC §6, 629 363 US 574 (1960) Plaintiff should not be penalized for first proceeding with his contractual remedies.'
>
> "In *King v. Georgia Power Company* 295 F Supp 943 (N.D. Ga 1968), as in other cases, it was held that contractual grievance procedures need not be exhausted prior to the filing of a complaint with the Equal Employment Opportunity Commission. The Court only said there that Title VII remedies are independent of contractual remedies and therefore there is no pre-requisite that an employee exhaust his contractual remedies before he files his charge with the E.E.O.C. The position which we take here is not inconsistent with this, for in *Georgia Power*, the Court did not deal with the question of what happens if the

employee invokes his contractual remedies. There is nothing inconsistent with stating that the employee need *only* follow the procedures for relief provided in Title VII and if he follows first his contractual remedies, he is not barred from proceeding under Title VII even if processing his contractual remedies takes more than 90 days."

The United States District Court for the Northern District of Alabama, Southern Division, in *The United States v. H. K. Porter, Inc.*, 296 F Supp 40, 109 (1968) the Court, stated as follows:

> "Objecting to the introduction of this evidence at the trial, the Attorney General argued that the award of an arbitrator cannot be res judicata or binding on the Court in a Title VII case. There has been no argument by the Defendants that any such effect should be ascribed to the award, but to put the matter to rest, the Court will say that it agrees with the Attorney General and has in no way regarded this arbitration award as in the least binding, final, or conclusive, for not withstanding Professor McCoy's eminence in the legal and arbitration professions, he was not deciding the case in the framework of the statutory provisions of Title VII. Furthermore, as a general proposition, the Court doubts that the Courts should defer in their consideration of Title VII cases, to arbitration awards." 296 F Supp 40, 109

The arbitration proceedings which Dewey pursued prior to his filing of a charge with the EEOC were limited by the contract to considering matters raised under the contract and rights arising out of the contract. Article XI Section 2 Step 5 of the Contract:

> "The arbitrator shall have authority to interpret this Agreement for the purpose of settling the grievance but he shall have no authority to add to or to detract

from or change this Agreement or to arbitrate wages for new or changed jobs or production standards."

Also see *Medo Photographic Supply Corp. v. Livingston*, 274 F Supp 209, 213 where the Court said, quoting *Torrington Co. v. Metal Products Workers Union Local 1645, UAW, AFL-CIO, ETC.*, 362 F 2d 677 (2d Cir. 1966).

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem * * * Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement."

Further, the opinion by the arbitrator (66a) indicates that the arbitrator never looked beyond the contract in determining the rights of the parties. As is evident from the cases hereinbefore cited as authority for when the doctrine of election of remedies applies and under what circumstances it applies, it is clear that when the issues or the rights litigated in two separate actions are separate and distinct, the doctrine of election of remedies is inapplicable. Further, since it is clear from a reading of the arbitrator's opinion that the only issues raised in the arbitration proceedings were the issues of the rights of the parties under the contract, obviously the issues involved in Dewey's rights under Title VII were not raised in the arbitration proceedings. Further, Dewey submits that the arbitrator would not have jurisdiction to rule upon the rights of the parties under Title VII since Congress has vested jurisdiction over disputes arising under Title VII in the United States District Courts. Congress, when it enacted Title VII, was aware of the widespread use of binding arbitration in resolving industry's labor disputes. Knowing this, Congress spelled out an entirely separate procedure to be followed in cases involving discrimination on the basis of race, sex, religion and national origin. If it intended that arbitration should be binding and there-

fore a bar to subsequent litigation in the United States District Courts, it surely would have said so.

In the field of labor law, there is a policy to promote settlement of problems by arbitration. Following the policy the Board will decline to take jurisdiction in some cases where arbitration has taken place provided certain conditions are met by the arbitration proceedings. These conditions are as follows:

(a) The factual issues before the arbitration are identical to those before the Board.

(b) The hearing and evidence presented must deal adequately with all factual issues.

(c) The arbitrator must have decided the factual issues involved before the Board. (See *Spielberg Manufacturing Co.* 112 NLRB 1980, 36 LRRM 1152 (1955) and *Raytheon Co.* 52 LRRM 1129, 140 NLRB 883 (1963) and *Auburn Rubber Co.* (1965) 156 NLRB 39, 61 LRRM 1033.

Therefore, if an issue was not raised in the arbitration hearing or if the matter was not adequately presented and the issue involves conduct which might constitute an unfair labor practice, the Board will take jurisdiction to dispose of a charge of an unfair labor practice.

As hereinbefore set forth, the issue of a violation of Title VII was not before the arbitrator. Further there was no evidence before the arbitrator that the standards determinative of whether or not a contract right of an employee has been violated are the same standards required under Title VII. The crucial language from the contract which was before the arbitration is Article IX Section 3, et seq., and specifically,

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working. . ."

The statutory language which gives rise to the case at bar is 42 U.S.C.A. 2000e-2(a), which provides:

> "(a) It shall be an unlawful employment practice for an employer,—
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or. . ."

The Fifth Circuit Court of Appeals in *Bowe v. Colgate Palmolive Company* 416 F 2d 711 (1969) the court says, at 416 F 2d 711, 714:

> "The situation facing the trial court was one in which there exists concurrent jurisdiction under the statutory scheme and under the grievance and arbitration process for the resolution of claims against an employer and a union. The analogy to labor disputes involving concurrent jurisdiction of the NLRB and the arbitration process is not merely compeling, we hold it conclusive." (footnote omitted)

Therefore, even under the labor law procedure, where arbitration may be a bar to further litigation with respect to statutory violations, the arbitration proceedings which took place prior to Dewey's filing a charge with the EE OC cannot be a bar to the vindication of his statutory rights under Title VII since these rights were never considered and never litigated in the arbitration proceedings.

CONCLUSION

It is the position of Robert Kenneth Dewey, Petitioner, that the decision of the Sixth Circuit Court of Appeals be

reversed and the District Court's Opinion and Judgment affirmed; and that the case be remanded to the United States District Court for the Western District of Michigan, Southern Division, for further proceedings pursuant to the District Court's Judgment and Opinion.

Respectfully submitted,

By Donald F. Oosterhouse

By Peter R. Tolley

Attorneys for Petitioner,
Robert Kenneth Dewey

950 Union Bank Building
Grand Rapids, Michigan 49502
616-454-9321

Dated: February 24, 1971